



**Ongaro v Judicial Service Commission & another (Petition
E067 of 2021) [2022] KEELRC 1186 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1186 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E067 OF 2021**

CN BAARI, J

JULY 14, 2022

BETWEEN

GEORGE ODONGO ONGARO PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein, George Odongo Ongaro, was offered employment in the position of Clerical officer in the service of the 1st Respondent on 17th June, 2016. He accepted the offer on the 4th of July, 2016.
2. The Petitioner was then posted to Kakamega Law Courts where he served until 24th October, 2019, when he was suspended from duty on allegations of colluding with one Jacob Ongaro Waka, his step brother who also worked for the 1st Respondent, then stationed at Maua Law Courts, and defrauded the 1st Respondent the sum of Kshs. 100,000/-
3. The Petitioner was summarily dismissed from the service of the Respondents on 10th December, 2020, on the grounds of gross misconduct, hence this petition.
4. The constitutional foundation for the petition is said to be articles 10, 20, 23, 41(1) and 47 of the *Constitution*. The statutory provisions are said to be sections 3, 4, and 12 of the *Fair Administrative Actions Act*, sections 43, 44 and 45 of the *Employment Act*.
5. Parties sought to canvass the petition through written submissions.



The Petition

6. The petition was lodged on 28th December, 2021, wherein, the Petitioner seeks the following reliefs:
 - i. A declaration that the Respondents' decision to summarily dismiss his service is unfair, illegal and unjustified.
 - ii. An order of Certiorari to quash the Respondents' decision to summarily dismiss the Petitioner.
 - iii. An order of Prohibition against the implementation of the summary dismissal.
 - iv. A declaration for payment of withheld salaries, allowances and other benefits.
 - v. An order of Mandamus for payment of withheld salaries, allowances and other benefits.
 - vi. An order of Mandamus for the reinstatement and deployment of the Petitioner without loss of rank, status and benefits.
 - vii. General damages for violation of his constitutional and statutory rights and the costs of the petition.
7. The Petitioner states that he earned a monthly gross salary of Kshs. 60,000/-. He further avers that for three years in the service of the Respondents, he served diligently, honestly, competently and without any work-related disciplinary issues.
8. The Petitioner states that the Respondents suspended him from duty pending investigation and hearing of his case. He states that the suspension arose from allegations of collusion with one Jacob Ongaro Waka, to defraud the Judiciary the sum of Kshs. 100,000.00.
9. The Petitioner admits that Jacob Ongaro Waka, is his step brother, then stationed at Maua Law Courts as an Accountant.
10. The Petitioner states that he was summarily dismissed from the service of the Respondents on 10/12/2020, which dismissal took effect from 24/10/2019, being the date he was suspended from duty. The Petitioner further avers that the dismissal has occasioned him loss of employment related benefits and a tarnished integrity.
11. The Petitioner avers that the summary dismissal was unfair and violated his constitutional and statutory rights to fair labour practices and fair administrative action.

The Response

12. The Respondents opposed the petition through their joint replying affidavit sworn by the 2nd Respondent on 22/2/2022.
13. The Respondents' case is that in 2018, the Judiciary carried out a financial audit of their books of accounts at Maua Law Courts for the period between the year 2015 and 2017.
14. The Respondents further states that the audit revealed that the Petitioner's Bank Account held at Kenya Commercial Bank, Account No. [particulars withheld] at Flamingo S & L Branch, was credited with two cheques of Ksh.50,000.00 each from the Maua Law Courts, which were deposited between March and April, 2016.
15. The Respondents avers that the revelation prompted the 2nd Respondent to issue the Petitioner a letter dated 14th May, 2019, to explain the circumstances under which the money was deposited into his



- account. The Respondents further aver that the Petitioner responded to the letter vide his letter of 17th May, 2019, out-rightly denying receipt of such payment.
16. The Respondents' case is that following the Petitioner's denial of receipt of the money despite the glaring evidence adduced by the 2nd Respondent, the Respondent proceeded to issue him with a letter dated 24th October, 2019, to show-cause why he should not be dismissed from employment on account of corrupt practices, collusion and gross misconduct contrary to Section D(7.2) of the Respondents' Human Resource Policies and Procedures Manual and section 43 (3) and 44 (4) of the Employment Act.
 17. The Respondents aver that they suspended the Petitioner from employment pending finalization of the disciplinary case against him. It is the Respondents' case that the Petitioner's response to the show cause letter through his letter dated 7th November, 2019, gave a narrative contrary to what he had initially given in his letter of 17th May, 2019.
 18. The Respondents aver that in the letter the Petitioner wrote on 7th November, 2019, to the Respondents, he admitted receiving the sum of Kshs.100,000.00 and further stating that Mr. Ongaro Waka, called him notifying him of the deposit and denying knowledge of where Mr. Waka had received the money from.
 19. The Respondent aver that the Petitioner was invited for disciplinary hearings on three occasions; 9th March, 2020; 5th June, 2020; and 20th August, 2020, through letters dated 17th February, 2020; 3rd April, 2020; and 6th August, 2020. The Respondents contend that they accorded the Petitioner an opportunity to make oral representations before the Respondent's Human Resource Management Advisory Committee.
 20. The Respondents pray that the petition herein be dismissed with costs for the reasons foregone.

The Petitioner's Submissions.

21. It is submitted for the Petitioner that the Respondents acted unfairly, unreasonably and disproportionately and without a valid reason in summarily terminating the Petitioner's employment.
22. The Petitioner further submits that it is the duty of an employer to adhere to the provisions of sections 41 (1), 43, 45 and 46 of the Employment Act, and section 4(1) of the Fair Administrative Action Act when dismissing the Petitioner. He sought to rely on the holding of Justice Kiage in Judicial Service Commission & Another v Lucy Muthoni Njora (2021) eKLR to buttress this position.
23. The Petitioner submitted that the disciplinary process was not expeditious, having lasted about 14 months starting from 24/10/2019, culminating in the Petitioner's dismissal in December, 2020, and thereafter, took about six months to determine the Petitioner's appeal dated 14/1/2021.
24. It is submitted for the Petitioner that article 23(3) of the Constitution empowers this Honourable Court, while determining claims of violation of rights, to grant remedies such as declaration of rights, an injunction, compensation and judicial review remedies including certiorari and mandamus. The Petitioner further submits that Section 11(1) of the Fair Administrative Action Act also empowers this Honourable Court to grant similar judicial review reliefs.
25. The Petitioner further submits that section 49(1) (c) of the Employment Act entitles an employee who has been unfairly terminated, to monetary compensation of up to 12 months of their gross monthly salary as at the time of their dismissal.



26. The Petitioner submits that he has established on a balance of probabilities that his summary dismissal was substantively and procedurally unfair and that it violated his constitutional and statutory rights to fair labour practices and fair administrative action.

The Respondents' Submissions.

27. It is submitted for the Respondents that the inconsistencies revealed by the audit report, coupled with evidence that the Petitioner received money from Maua Law Court's account, led the Respondent to genuinely believe that the Petitioner was culpable for the charges proffered against him thus satisfying the provisions of Section 43 of the *Employment Act*. The Respondents submit that they had valid, fair and justified reasons for dismissing the Petitioner. They had reliance on the holding in *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR.
28. The Respondents submit that although the Petitioner told the disciplinary committee that the actions in question occurred prior to his employment with the 1st Respondent and as such, it was unlawful for the 1st Respondent to refer to said actions when exercising its right to levy disciplinary proceedings against him, they submit that as soon as the Petitioner joined the 1st Respondent, she was empowered to exercise administrative authority over the Petitioner's actions regardless of the timeline, if said actions were to the detriment of his employer.
29. The Respondents submit that the fact that the Petitioner refunded the money in question, and which he had unprocedurally obtained, did not absolve him from blame partaking in criminal activities that were detrimental to the 1st Respondent. The Respondents relied on the case of *Benedict Kariuki v DHL Worldwide Express [K] Limited* [2017] eKLR where the Court stated as follows;
- “The Court is convinced the Claimant was a dishonest Employee who converted his Employer's resources to his own use. Later refund did not absolved him form this act of gross misconduct.....Termination was based on valid reason, and justified under sections 43, 44(4) (g) and 45 of the *Employment Act* 2007”
30. The Respondents submit that any reasonable employer that comes to discover that an employee participated in a scheme that amounted to criminal actions to its own detriment, would have every reason to terminate such employee. The Respondents further submit that they acted reasonably and responsibly, and as such there was substantive justification of the Petitioner's dismissal.
31. It is submitted for the Respondents that the Petitioner's dismissal was procedurally fair as the threshold under section 41 of the *Employment act* was met. They placed reliance on the holding in *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR.
32. The Respondents submit that the Petitioner is not entitled to any of the prayers sought, and the Petition should be dismissed with costs.

Analysis and Determination.

33. I have carefully considered the pleadings herein and the rival submissions. The following issues arise for determination:
- a. Whether the Respondents violated the Petitioner's rights and fundamental freedoms under articles 10, 20, 23, 41(1) and 47 of the *Constitution*.
 - b. What remedies ought to issue.
 - c. Whether the petition violates the doctrine of Constitutional avoidance.



Whether the Respondents violated the Petitioner’s rights and fundamental freedoms under Articles 10, 20, 23, 41(1) and 47 of the Constitution.

34. The petition herein is premised on a decision by the Respondents to summarily dismiss the Petitioner from service on the ground of gross misconduct. The Petitioner contend that by their decision, the Respondents violated his Constitutional rights to fair labour practices and his right to fair administrative action enshrined in Articles 41(1) and 47(1) of the *Constitution*.

35. Article 41(1) of the *Constitution* entitles every person to fair labour practices. Article 47 (1) of the *Constitution* states:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

36. Section 4(4) of the *Fair Administrative Actions Act*, Sections 41, 43, 45, 46 and 47 of the *Employment Act*, 2007, give effect to Articles 41 and 47 of the *Constitution*.

37. To determine whether or not the Respondents violated the provisions of the *Constitution* upon which the petition is premised, the court has to make a finding on whether or not the employer/Respondents met both the procedural and the substantive justification tests prior to dismissing the Petitioner.

38. On the question of procedure, both sections 41 of the *Employment Act* and section 4 (4) of the *Fair Administrative Actions Act*, demand that an employer informs an employee in a language the employee understands the reasons for which it is considering dismissal/termination, and allow the employee to be represented by a shop steward or a fellow employee during the hearing. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the Court had these to say on section 41:

“To satisfy the requirements of section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.

39. The Petitioner asserts that he was not given a fair hearing prior to the summary dismissal. The Respondents on their part, contend that they adhered to both the Constitution and the law, in relation to termination/dismissal procedures having allowed the Petitioner opportunity to make representation by way of a response to the show cause letter.

40. The Respondent further contend that the Petitioner appeared before a committee of the Respondent for a disciplinary hearing. In the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is being considered.

41. The evidence tendered in this matter shows that the Petitioner was issued with a show cause letter which he responded to. It is also not disputed that the Petitioner attended a disciplinary hearing and thereafter lodged an appeal against the decision to dismiss him. In the Nigerian Supreme Court decision in *BA Imonikhe v Unity Bank PLC* S.C 68 of 2001 it was held:

“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the



requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”

42. The Petitioner’s contention that he was not accorded a fair hearing and hence a violation of his rights, is not supported by the evidence before court. That the Petitioner is not satisfied, or is aggrieved by the outcome of the hearing, does not make the decision unprocedural, unlawful or unconstitutional.
43. I find and hold that the Petitioner’s dismissal met the procedural fairness test.
44. The second limb in determining fairness of a dismissal is the validity and justifiability of the reasons for the dismissal. The Petitioner by his submissions contended that the Respondents did not adhere to the provisions of Sections 43, 45 and 46 of the *Employment Act*.
45. In the case of *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR, also cited by the Respondents, the Court stated:

“It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment. The Court of Appeal affirmed this position in its decision in *Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR by citing with approval the following excerpt from the *Halsbury’s Laws of England*, 4th Edition, Vol.16(1B) para 642:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable response to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair ... ”

46. The Respondents’ letter summarily dismissing the Petitioner indicated the reason for the dismissal as gross misconduct. The letter further specifies the misconduct as colluding and defrauding the Judiciary of funds amounting to Kshs. 100,000.00 from a Maua Law Courts Deposits account.
47. The Petitioner in his response to the show cause letter dated 7th November, 2019, admitted receiving the money from his half-brother, and further stating that he had no reason to question him on the source of the money for reason that he had previously assisted him financially. It was submitted that the Petitioner told the disciplinary committee that his step-brother asked him to give him back Kshs. 80,000/- of the amount deposited and keep Kshs. 20,000.00.
48. The Petitioner further submitted that at the time he received the money, he was not an employee of the Judiciary.
49. The question for the court is whether the reason put across for the Petitioner’s dismissal is valid, fair and reasonable. In *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR it was held that the Court looks into the validity and justifiability of the reasons for termination.



Further, the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR held:

“... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5)).”

50. The Petitioner received money into his account in an act of fraud perpetuated by his brother. He obtained an economic advantage following Mr. Waka’s crimes of subverting judiciary funds and that renders him a beneficiary of proceeds of crime which makes him subject to sanctions, civil, criminal or administrative.
51. I find and hold that it was an eminently reasonable for the Respondents to dismiss the Petitioner faced with the conduct displayed by him as demonstrated in the evidence before court. The Dismissal is not unfair.
52. Having found the summary dismissal to be fair, goes to confirm that the Petitioner’s rights under articles 41 and 47 were not violated.

What remedies ought to issue

53. The Petitioner sought a declaration that his dismissal is unfair, an order of Certiorari to quash the dismissal, an order of Prohibition to restrain the Respondents from implementing the dismissal and an order for payment of all salaries and allowances withheld.
54. The remedies sought herein are only tenable upon a finding of an unfair dismissal and/or a finding of violation of the Petitioner’s rights.
55. The court having found the dismissal not to be unfair, and no rights violated, means no remedies will issue. The Petition is dismissed in its entirety.

Whether the petition violates the doctrine of Constitutional avoidance

56. The petition herein is premised on a dismissal from the service, the Respondents’/employer’s disciplinary procedure and remedies for unfair termination. These issues are all, without exception, employment issues, that could have been dealt with through a normal cause under the *Employment Act*, 2007, through a normal cause and not by way of a constitutional petition. In the case of *Re Application by Bahadur* [1986] LRC 297, a case from Trinidad & Tobago, the Court held thus: -

“... the *Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the *Constitution*.”

57. The Western Cape High Court in the South African case of *SA Naptosa & Others v Minister of Education Western Cape & others* [2001] BLLR 338 at 395 stated:

“... If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the act, the Act might come under scrutiny for not giving adequate protection to a constitutional right ”



58. The Court of Appeal In *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR again emphasized thus:

“In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly, invoking the constitutional route in the circumstances of this case was misguided. The *Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.”

59. Guided by the foregoing decisions of the superior courts, I find and hold that the petition herein offends the principle of constitutional avoidance.

60. In conclusion, the court finds and holds that the petition herein lacks merit, and is hereby dismissed in its entirety.

61. Each party shall bear their own costs of the petition.

62. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 14TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Okelloh Present for the Petitioner

Ms. Achitsa h/d for Mr. Mwangi for the Respondents

Christine Omollo- C/A

